BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Commission Review of and Response to the Federal Communications Commission's Triennial Review Order Relative to Network Unbundling Obligations and Related Issues	**05-TI-824**

VERIZON'S COMMENTS ON THE IMPLEMENTATION OF THE FCC'S TRIENNIAL REVIEW DETERMINATIONS IN WISCONSIN

INTRODUCTION

In its July 25, 2003 *Notice of Investigation*, the Public Service Commission of Wisconsin ("Commission") requested that persons interested in the "actions that the Commission will need to take" in response to the Federal Communications Commission's ("FCC") Triennial Review order "identify themselves to the Commission in writing by August 4, 2003." In this notice, the Commission also called for the submission of "a brief, non-binding statement of the issues of concern to the filing party and an explanation of why this issue is deemed important to this investigation."

By this filing, Verizon North Inc. ("Verizon") identifies itself as an entity interested in the Commission's investigation of Triennial Review matters. While the precise details of the Commission's tasks will not be known until the FCC releases its Triennial Review order ("TRO"), the FCC's public statements regarding its Triennial Review conclusions, together with prior guidance from the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit, provide the Commission with a solid foundation upon which to begin its efforts. Listed below are a number of issues that the Commission can consider at this time.

ISSUES OF CONCERN

I. THE COMMISSION SHOULD STRUCTURE ITS UNBUNDLING PROCEEDINGS BASED ON THE DIFFERENT DEADLINES SET BY THE FCC

The FCC has assigned certain tasks and determinations regarding the unbundling requirements of section 251 of the 1996 Act to state commissions, and has required these commissions to complete this work within specified deadlines – 90 days for any examination of whether switching should be unbundled for business customers served by high capacity loops, and nine months for all other unbundling determinations. Given these different time frames, the Commission should conduct two separate proceedings – one for those network elements covered by the FCC's nine month deadline, and one for the unbundling of switching for business customers served by high capacity loops, if these proceedings prove to be necessary.

The specific aspects of these determinations, such as geographic scope and other relevant classifications, will presumably be addressed by the FCC in its actual Triennial Review order. The FCC has indicated it will provide the "mandatory and exhaustive" criteria for making the determinations the FCC has assigned to state commissions. Accordingly, both the scope of the Commission's investigations and the standards it must apply in making its determinations will be fixed by the FCC.

II. THE COMMISSION SHOULD CONDUCT ITS OWN IMPAIRMENT PROCEEDINGS

To the extent that proceedings are required in Wisconsin, the Commission should conduct its own, Wisconsin-specific unbundling proceedings. It would be inappropriate for the Commission to combine its proceedings with similar investigations conducted by other state commissions. First, it is unlikely that the interested parties in Wisconsin will

be identical to those in other states, so it may not be practical or efficient for the Commission to combine its factual investigation with other state commissions. Second, the FCC's stated purpose in delegating impairment determinations to the states, despite express statutory language that Congress expected the FCC itself to make these determinations, is that specific state investigations provide a degree of "granularity" that the FCC concluded was both necessary and unavailable to it. Diluting this state-specific focus through multi-state proceedings would therefore be inconsistent with both the FCC's stated justifications and its expectations.[1]

III. THERE IS LIKELY NO NEED FOR A "90 DAY" PROCEEDING

The FCC has indicated that it will establish a "presumptive finding of no impairment" for switching used for business customers served by high-capacity loops. It did so, no doubt, because there is little (if any) dispute about the lack of impairment for such switching. For example, both AT&T and Z-Tel have already conceded this point.[2]

For this reason, there likely will be no need for the Commission to take any affirmative steps regarding an impairment analysis of switching used for business customers that are served by high-capacity loops, and the Commission should not devote any resources to a task that will likely prove to be unnecessary (and which must be completed in 90 days). Accordingly, the Commission should issue a public notice

[1] While Verizon believes that formal, multi-state proceedings would be inconsistent with the FCC's justification for assigning these proceedings to state commissions and therefore improper, Verizon would not object to informal open meetings between state commissions and carriers in the Great Lakes region, provided these meetings were strictly limited to a discussion of scheduling and other procedural issues of common interest.

[2] *See* Reply Comments of AT&T, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 01-338 at 19 (filed with the FCC on July 17, 2003) ("[T]here is only a single class of customers that CLECs can economically serve without reliance on unbundled switching: customer locations that are served by DS-1 and higher capacity loops . . . ."); Comments of Z-Tel Communications Inc. at 56, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 01-338 (filed with FCC on April 5, 2003) ("Z-Tel does not contend that CLECs seeking to serve customers with more than 18 lines are not impaired without access to unbundled switching.").

indicating that it intends to conduct an impairment investigation regarding switching used for business customers that are served by high-capacity loops *only* if an interested party comes forward with a credible showing that demonstrates the need for such a review. Parties should have ten days from the date of this public notice to make this preliminary showing, which should include a verified pleading that contains the specific factual basis for the claim. Only upon a persuasive showing of this kind should the question of impairment for switching used for business customers served by high-capacity loops be considered further.

IV. THE COMMISSION ITSELF SHOULD PROMPTLY GATHER THE FACTS IT NEEDS TO MAKE ITS IMPAIRMENT DETERMINATIONS

The 1996 Act requires a determination as to "*which* network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[3] The FCC has indicated that evidence of actual commercial usage of non-ILEC network elements is "the best indicator that competitors are not impaired" and must be given "substantial weight."[4] Further, the United States Supreme Court has warned that in order to be consistent with the 1996 Act,

[3] *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 391 (1999).

[4] Responses of Michael J. Copps, Commissioner, Federal Communications Commission to Questions from the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, Response to Question 10 from Chairmen Upton and Tauzin ("The Order recognizes that actual commercial entry is the best indicator that competitors are not impaired. State Commissions will give substantial weight to evidence of such entry."); Responses of Commissioner Jonathan S. Adelstein to Questions for the Record Submitted by Members of the Subcommittee on Telecommunications of the House of Representatives Committee on Energy and Commerce, Response to Question 10 from Chairmen Upton and Tauzin ("Substantial weight will be given to whether there are currently CLEC-owned circuit switches in a particular geographic market serving particular customer classes. Although their presence is not dispositive, as there are additional factors at which the State Commission will be looking, their presence will be given great weight."); Commissioner Kevin Martin's Responses to Questions from House Committee on Energy and Commerce Chairmen Upton and Tauzin, Response to Question 10 ("Existence of alternative facilities serving a particular customer market is a significant factor that states will use in determining whether competitive carriers face economic and operational impairment when attempting to serve mass market customers in a particular geographic market.").

any impairment analysis cannot "blind itself to the availability of elements outside the incumbent's network."[5]

For all of these reasons, the data that will be the focus of the Commission's investigation will center around the availability of alternatives to ILEC network elements, which means that data collection must be focused primarily on CLECs – the parties with the most complete information on the alternatives available to them. And in order for the Commission to complete its work within the strict time frames set out by the FCC, it is essential that the Commission itself gather this relevant data, and that it do so unilaterally. It is likely that the Commission will be faced with a significant challenge just to conclude its review and reach its unbundling decisions within the timeframe set by the FCC. There will simply not be enough time for the Commission to rely solely on a party-driven, adversarial discovery process to collect the data the Commission will need. Instead of waiting for the parties to resolve disputes over the relevancy of facts and whether they are "discoverable," the Commission should collect this necessary data itself. The Commission's procedural rules expressly authorize such Commission-generated discovery.[6]

The Commission should therefore require all competing carriers in the state to respond to a series of specific questions regarding the availability of alternatives to the ILEC network elements at issue. Attached to this pleading is a list of such questions.[7]

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[5] *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 389 (1999) ("The [FCC] cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network.").

[6] *See* Wis. Admin. Code § PSC 2.24 ("In a proceeding, depositions and requests for the production of documents, data, or other information *may be taken or made by the commission* or any party as provided under ch. 804, Stats.") (Emphasis Added).

[7] These questions may have to be modified after the FCC's Triennial Review order is released, although the basic information sought will almost certainly be needed by the Commission regardless of the specific factors that comprise the FCC's impairment analysis.

Given the importance of this information – the Commission cannot properly complete its review without it – the Commission should require *all* competing carriers in the state to provide timely, full, and complete responses to the Commission's questions. The Commission should also expressly inform competing carriers they cannot avoid providing this data by declining to participate in the proceedings, and that the Commission will sanction any competing carrier that fails to provide complete and timely responses.

V. THE COMMISSION'S INITIAL PROCEEDINGS SHOULD FOCUS EXCLUSIVELY ON IMPAIRMENT

The Commission should initiate proceedings on impairment first. Any additional regulatory changes that arise out of the FCC's Triennial Review order should be addressed separately from the Commission's impairment proceedings. Given the tight time frames dictated by the FCC for the completion of the impairment proceedings, there will likely not be enough time for the Commission to also address any collateral issues that result from the Triennial Review order. In addition, at least some of these additional, collateral issues may be rendered moot by the Commission's impairments determinations, and so there will be no need for the Commission to consider them.

VI. THE 1996 ACT DOES NOT CREATE AN UNDERLYING DUTY TO MAKE ALL NETWORK ELEMENTS AVAILABLE; THEREFORE, THE ULTIMATE BURDEN OF PROOF IN ANY UNBUNDLING PROCEEDING ALWAYS RESTS WITH THOSE ADVOCATING THE UNBUNDLING OF A PARTICULAR NETWORK ELEMENT

The 1996 Act does not presume that CLECs will have blanket access to all of the network elements that make up the UNE Platform. To the contrary, as the United States Supreme Court has emphasized, the 1996 Act "does not authorize the Commission to create isolated exemptions from some underlying duty to make all network elements

available."[8] Instead, the 1996 Act affirmatively requires that before an ILEC can be required to unbundle a particular network element, "at a minimum," there must be a showing that the network element: (1) is "necessary" (if the network element is proprietary in nature) and (2) that a lack of access would "impair the ability" of a competing carrier to provide "the services that it seeks to offer."[9] Because the 1996 Act requires such a showing before unbundling can be authorized, the "ultimate burden of proof," or "burden of persuasion," remains at all times with those advocating the unbundling of the network element in question.[10] This is true regardless of any specific impairment standards set forth by the FCC.

As the FCC has pointed out, this ultimate burden of proof "never shifts from one party to the other."[11] Parties seeking unbundled access to a particular network must come forward with specific facts that support a finding of impairment or risk an adverse decision on the issue. Only after these specific facts have been offered, and a prima facie case for impairment established, does the "burden of production," shift to the incumbent

[8] *Iowa Utilities Bd.*, 525 U.S. at 391; *see also id.* at 390 ("We cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided.").

[9] 47 U.S.C. § 251(d)(2).

[10] *Cf.* Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, ¶ 43 (1997) ("Because Congress required the Commission affirmatively to find that a BOC application has satisfied the statutory criteria, the ultimate burden of proof with respect to factual issues remains at all times with the BOC, even if no party opposes the BOC's application.").

[11] First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, ¶ 345 (1996) ("As an initial matter, we note that the term 'burden of proof' has historically been used to describe two separate but related concepts. First, it has been used to describe the burden of persuasion with respect to a particular issue which, under the traditional view, never shifts from one party to the other any stage in the proceeding. Second, it has been used to describe the burden of going forward with evidence necessary to avoid an adverse decision on that issue. This burden may shift back and forth between the parties.").

LEC to rebut this showing. But the ultimate burden of proof always remains with those carriers seeking unbundled access to a particular network element.

In addition to being consistent with the 1996 Act and the United States Supreme Court's ruling on unbundling, placing the ultimate burden of proof on the party seeking unbundled access has the additional virtue of requiring those carriers most likely to possess the most relevant information to come forward with this information at an early stage of the proceedings. Together with the data that the Commission receives from the questions that it requires all competing carriers to answer, this additional information provided by carriers seeking unbundled access will ensure that the Commission quickly obtains the relevant evidence it needs to develop a full record. The short deadlines for decision set by the FCC effectively mandate such prompt data collection.

VII. CLECS ARE "IMPAIRED" ONLY IF AN INDIVIDUAL NETWORK ELEMENT WOULD BE UNNECESSARILY EXPENSIVE FOR CLECS TO DUPLICATE

As discussed above, the 1996 Act "does not authorize the [FCC] to create isolated exemptions from some underlying duty to make all network elements available," but instead requires it to determine "*which* network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[12] The Supreme Court has already explicitly rejected the argument that any increased cost or decreased service quality satisfies the "necessary and

[12] *Iowa Utilities Bd.*, 525 U.S. at 391. Indeed, the 1996 Act not only does not authorize the Commission to impose on ILECs a requirement of "blanket unbundling," but the FCC expects that at least some state commissions will conclude that UNE-P should no longer be available. *See* Remarks of Jonathan S. Adelstein, Commissioner, Federal Communications Commission, Before the National Association of Regulatory Utility Commissioners, February 25, 2003 (As prepared for delivery) ("I must emphasize that the delegated role that you [state commissions] will have in the process isn't about finding perpetual impairment. I fully expect you will surprise a lot of your skeptics that claim that this is simply an exercise in keeping UNE-P alive forever.").

impair" standard for unbundling set forth in the 1996 Act.[13] Rather, the relevant issue in determining whether a particular network element must be unbundled is whether the "duplication" of that network element, standing alone, would prove "unnecessarily expensive."[14] As the Supreme Court has observed, "entrants may need to share some facilities that are expensive to duplicate (say, loop elements) in order to be able to compete in other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology)."[15] Before ordering the unbundling of a "more sensibly duplicable element[]" such as switching, the Commission must ensure that, in light of the competitive alternatives, such unbundling is really necessary – not that unbundling should be required because CLECs claim UNE-P is "better," or "cheaper," or "easier," or "more beneficial."

Nor can the Commission accept the facile argument that a new entrant is impaired without access to ILEC switches because of the cost disparity caused by the economies of scale between a new entrant and an incumbent. This argument is inconsistent with the 1996 Act. As the United States District Court of Appeals for the District of Columbia Circuit has pointed out, "average unit costs are necessarily higher at the outset for any new entrant into virtually any business."[16] For this reason, "[t]o rely on cost disparities [to justify unbundling] that are universal between new entrants and incumbents in *any* industry is to invoke a concept too broad, even in support of an *initial* mandate, to be reasonably linked to the purpose of the Act's unbundling provisions."[17]

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[13] *Iowa Utilities Bd.*, 525 U.S. at 391-92.
[14] *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 510, n. 27 (2002) (stating that the 1996 Act "allows for an entrant . . . to lease some 'unnecessarily expensive' elements . . . .").
[15] *Id.*
[16] *USTA v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002).
[17] *Id.*

In making any impairment determination, the Commission must also take into account the existence of "the cross-subsidization often ordered by state regulatory commissions, typically in the name of universal service,"[18] the advantages that CLECs have over ILECs – advantages such as "being free of any duty to provide underpriced service to rural and/or residential customers and thus of any need to make up the difference elsewhere,"[19] and the undeniable fact that "unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."[20] Before "inflict[ing] on the economy" these sorts of costs, this Commission must weigh the "competitive context" carefully, since, contrary to what some may suggest, "unbundling is not an unqualified good." [21]

Respectfully submitted,

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[18] *Id.* at 422.
[19] *Id.* at 423.
[20] *Id*. at 427.
[21] *Id.* at 429.